

MAY. 23. 2005 3:55PM

HALL ESTILL ET AL PC

NO. 1275 P. 2/4



Michael D. Graves
 Direct Dial: (918) 594-0443
 Facsimile: (918) 594-0505
 mgraves@hallestill.com

May 23, 2005

VIA FACSIMILE AND MAIL

Mr. D. J. Parrish, Director
 Oklahoma Department of Agriculture, Food, and Forestry
 2800 N. Lincoln Blvd.
 Oklahoma City, OK 73105-4298

Dear Mr. Parrish:

This letter is in response to your May 18, 2005 Memorandum and the two-page "Considerations Requested by Poultry Operations at the May 3, 2005 Meeting at Kansas, Oklahoma," which were sent to certain poultry growers. I represent all fifteen of the poultry grower recipients¹ of those documents. You have asked each of them to volunteer to have their poultry litter and certain of their fields, on which poultry litter has been applied as fertilizer, tested. These growers consider themselves good stewards of their land, and are proud of their reasonable and prudent use of poultry litter to enhance the productivity of their farms. They also appreciate the efforts you made to alleviate some of the concerns they expressed at the May 3, 2005 meeting with Secretary Peach about your proposed testing regimen.

Each of these growers is pleased to voluntarily allow the Department to sample their fields to determine the soil concentration of the fertilizer nutrients over which the Department has regulatory authority. The "nutrients" over which the Department has authority are: nitrogen; phosphate; potash; calcium; magnesium; sulfur; boron; chlorine; cobalt; copper; iron; manganese; molybdenum; sodium; and zinc. See, 2 O.S. 2001 § 8-77.11, and OAC §§ 35:30-29-22(a) and (c). The Department is not authorized to test for any other substances,² and these growers respectfully decline to permit the Department to test for any other substances. Accordingly, unless I receive a signed agreement limiting the Department's proposed testing regimen to defined "nutrients," the Department may not collect samples from these growers' farms.

¹ These growers are: Julie Anderson; Dennis Chamberlain; Howard Ferrell; David Geasland; Kenny Glenn; Carl Guthrie; Johnny Johnson; Jim Pigeon; Ricky Reed; Emmett Ross; W.A. and Bev Saunders; Bob Schwabe; Roy Teague; Charles Williams; and Balton Winningham.

² See, 2 O.S. 2001 §§ 10-9-7(C)(3), (D)(2) and (E)(1)(b).

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In addition, I understand the response to Question A on the "Considerations" document to mean that, although there will be only one six-inch core taken at each soil sampling location, each of those six-inch cores will be broken into three parts, 0"-2", 2"-4" and 4"-6", and each of those separate segments combined and a composite sample analyzed for each segment. We are not aware of any valid testing regimen that composites soil samples in that manner. The protocol which these growers are required to follow is to take multiple six-inch cores, combine them on-site and have that single composite analyzed.³ Accordingly, the Department must also amend its proposed testing regimen for soils to take full-depth (0"-6") cores, combine the cores on-site, and have that single composite analyzed.

These growers are willing to voluntarily allow the Department to perform its proposed testing regimen, if it is modified in accordance with the preceding two paragraphs, even though the Department has no legal authority to require such testing under either the Oklahoma Registered Poultry Feeding Operations Act ("ORPFOA") or the Oklahoma Poultry Waste Applicators Certification Act ("OPWACA").⁴ Under the ORPFOA, the Department may investigate "complaints as to the operation or to determine whether there are any violations of the [Act]." 2 O.S. 2001 § 10-9-10(A)(1)(a).⁵ Here, however, the Department has received no "complaint" concerning the operations of any of these growers. Nor has the Department any reason to believe any of these growers are violating the ORPFOA. In fact, it is our understanding that these growers were asked to volunteer precisely because each is in compliance with the ORPFOA.

At the meeting Secretary Peach held with these, and other, growers on May 3, 2005, the Secretary handed out a two-page "Summary of Agency Authority for Sampling." Included in that Summary is the Department's authority to enforce Oklahoma's water quality standards. See, 27A O.S. 2004 Supp. § 1-3-101(D)(1)(h). However, there has not been any allegation that these growers have violated any specific water quality standard applicable to any water body in the Illinois River watershed. Accordingly, the Department's authority to enforce water quality standards simply is not applicable. See, 27A O.S. 2004 (supp.) § 1-3-101(D)(h).⁶

³ See, OK NRCS Code 590, at 590-2 (Feb. 2004) and OSU Extension Facts publication F-2207.

⁴ The OPWACA, at 2 O.S. 2001 § 10-9-20(C), authorizes the Department to "take samples of poultry waste and soil at application sites in order to determine their concentration." However, the OPWACA does itself not set any standards or define any terms. Those are established elsewhere.

⁵ Similarly, 2 O.S. 2001 § 2-14(B) authorizes the Department to conduct investigations to determine compliance with the Oklahoma Agriculture Code. Here, the only pertinent parts of the Agriculture Code are the ORPFOA and the OPWACA.

⁶ The Department has not promulgated any rules implementing this authority. Therefore, any attempt to use this vague and ambiguous authority would constitute a denial of due process, and will be vigorously contested. Cf. Switzer v. City of Tulsa, 598 P. 2d 246 (Okla. Cr. 1979).

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Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael D. Graves", written in a cursive style.

Michael D. Graves

MDG:jls

cc: Keith Morgan
All growers listed in footnote 1

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